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No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE REV. VERNON ROBERTSON - - Petitioner

versus

CITY OF LOUISVILLE, BY AND THROUGH THE URBAN RENEWAL & COMMUNITY DEVELOPMENT AGENCY OF LOUISVILLE - - - - - - - - - Respondent

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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HPP

QUESTIONS PRESENTED FOR REVIEW

(1) Is it good public policy for Courts to take an absolute stand of nonreviewability of eminent domain takings?

(2) What standards should the Courts apply when reviewing actions of the condemnor claimed "arbitrary" by the condemnee?

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v.

CITY OF LOUISVILLE, BY AND THROUGH THE URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF LOUISVILLE - *Respondent*

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

The Respondent, City of Louisville, by and through the Urban Renewal and Community Development Agency of Louisville respectfully submits the following Brief in Opposition to the Petition for a Writ of Certiorari filed by Petitioner, the Rev. Vernon Robertson.

COUNTERSTATEMENT OF MATERIAL FACTS

This matter involves Respondent's, Urban Renewal and Community Development Agency of Louisville (hereinafter referred to as "Urban Renewal"), condemnation of three residential properties owned by Movant, Father Vernon Robertson, Pastor of St. Martin's Church which is located nearby. The testimony of Father Robertson (TE Vol. I, p. 23), and the

record (Respondent's original Complaint, Respondent's Appendix), clearly show that Movant purchased these properties *after* final approval of this plan pursuant to KRS 99.370. Although Movant complains that he was not specifically consulted about this project, he did attend meetings (TE Vol. I, p. 5) and knew enough about this project to purchase these properties within 3 weeks of the plan's approval. There is uncontroverted evidence that numerous neighborhood groups joined with public officials in working on this plan from February of 1979 until its final approval in March of 1982 (TE Vol. II, p. 66).

Neither Movant nor his witnesses have denied that this area is "blighted", nor have they alleged that the ordinance declaring this area an Urban Renewal Project Area was arbitrary or made in bad faith. In fact, Movant himself has tried to achieve the same goals of redevelopment and revitalization of this area as Respondent. His witnesses, Carl E. Kramer and Sammie Lee, both admit the mixed uses including commercial and residential in this area (TE Vol. I, p. 42-46) and the population loss suffered by this area (TE Vol. II, p. 24). While Movant states that there are not "commercial establishments on the southside of Gray between Shelby and Clay", he does admit that at least half of this block has a commercial use, being a surface level parking lot for the nearby commercial establishments (TE Vol. II, p. 110), as does his expert, Dr. Kramer (TE Vol. I, p. 46). Neither of Movant's expert witnesses presented their testimony or alterna-

tive plans to any of the reviewing bodies prior to the Urban Renewal Plan approval, on March 11, 1982, by the Board of Alderman of the City of Louisville (TE Vol. I, p, 47) and (TE Vol. II, p. 27).

In fact Mr. Lee testified that he did not really examine any of the Urban Renewal Plan because he did not consider it an issue (TE Vol. II, p. 26). Movant is clearly in favor of redeveloping this neighborhood. He just feels funds earmarked for this road should be spent some other way (TE Vol. I, p. 21). Movant's expert witness, Sammie Lee, takes the position that the existing street layout is sufficient in this area while conceding the massive population loss and other problems which exist in the area (TE Vol. II, p. 24-26).

Unfortunately neither of Movant's expert witnesses studied this area prior to 1985 after substantial improvements had been made as part of the Urban Renewal Plan.

Urban Renewal's witness, Henry Dosker, Assistant Director of Louisville and Jefferson County Office of Economic Development, testified about effort made during this process to save structures at 910-912 Chestnut Street originally scheduled to be demolished (TE Vol. II, p. 37). In addition, Movant's expert on historic preservation, Carl Kramer, testified that in fact it appeared that Respondent had approval to remove any structures it felt necessary pursuant to an agreement with the National Registry (TE Vol. I, p. 42-44).

Mr. Dosker testified to the redevelopment and rebirth that was already in progress in this area. (TE Vol. II, p. 30-31 and p. 51).

Gary Barta, the qualified planning consultant who worked on this Plan, testified concerning the efforts made by the planners and neighborhood groups involved to protect the residential core of this neighborhood (TE Vol. II, p. 67) and the nearby Clarksdale Public Housing Project from traffic (TE Vol. II, p. 69). In addition this route also utilized property located on the one hundred year flood plain and therefore ineligible for FHA insured rehabilitation loans (TE Vol. II, p. 74).

Movant has made much of the fact that this road will cause an increase in traffic at the Montessori School. However, Mr. Barta noted that most schools located in urban areas are on busy streets (TE Vol. II, p. 94).

There was *no* evidence presented at the trial concerning safety hazards to either school children or the elderly in getting too or from this church.

Mr. Michael French, a qualified engineer, who is also the City of Louisville Director of Public Works, testified that other alternate routes for this road were investigated and considered during the lengthy planning process. For various reasons these alternatives were discarded (TE Vol. II, p. 104). Both Mr. French and Mr. Barta testified that the impact on this block was considered, but for the project area as a whole, this was the best route (TE Vol. II, p. 102). In ad-

dition, the costs of the various alternatives were considered though, as Movant points out, not published in the Environmental Impact Statement. However, as Mr. Barta explained, the Environmental Impact Statement is prepared only to satisfy Federal Funding requirements and not as part of the KRS 99.370 approval process for this project. The court found that evidence showed that "the project planners considered the impact of the rerouting upon the affected area and areas" (Opinion and Order dated May 13, 1986, p. 6).

The record clearly illustrates a lengthy, careful planning process which was employed when planning not only the Urban Renewal Project, but the route of this roadway. The testimony of Mr. Lee for Movant and Mr. Barta and Mr. French for Respondent, shows that this route is neither the cheapest or easiest "quick fix" for the problems of this area. Rather it is the best alternative solution to the many, varied, and often conflicting problems which are being addressed by the Urban Renewal Project Plan for this entire neighborhood area.

REASON FOR DENYING THE WRIT

(1) The Court below did not take a position of absolute non-reviewability as alleged by Petitioner in his Petition for Writ of Certiorari.

While agreeing with this Court's decision in *Berman* v. *Parker,* 348 U. S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954), that once public use or public purpose has been decided it is a legislative function to decide land use

and need for a particular project, the Court below did review Petitioner's claim that this taking was arbitrary, capricious or an abuse of discretion.

Both the Jefferson Circuit Court and Kentucky Court of Appeals correctly ruled that when Petitioner raised this claim it was his burden to prove the acts which he alleged. *Louisville and Jefferson County Metropolitan Sewer District* v. *Joseph E. Seagram & Sons,* Ky., 211 S. W. 2d 122 (1944).

Petitioner totally failed to meet this burden of proof. There was *no* evidence that this taking was arbitrary, capricious or an abuse of discretion.

This Court's ruling in the *Berman* case has been repeatedly upheld because such determinations are inherently vested in the legislative branch of government. *Hawaii Housing Authority* v. *Midkiff,* 467 U. S. 229, 104 S. Ct. 2321, 81 L. Ed. 186 (1984), *Ruckelshaus* v. *Monsanto Company,* 467 U. S. 986, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984).

It is clear in this case that Petitioner simply wished to substitute his judgment as to what route this road should follow for that of the legislature.

(2) The Lower Courts have applied correct standards in reviewing the action of Urban Renewal claimed arbitrary.

Petitioner cites the Florida decision of *Sapp* v. *Hillsborough County,* (Fla.), 262 So. 2d 256 (1972) as the standard to be applied in reviewing eminent domain proceedings. However, the Supreme Court of Florida reversed that decision in *Hillsborough County*

v. *Sapp,* (Fla), 280 So. 2d 443 (1973) and set out the correct standard of review in these cases:

> "When the trial court approves the determination of reasonable necessity and finds no abuse of discretion, a reviewing court is then limited to deciding whether or not there was competent substantial evidence to support the decision of the trial court." (at p. 445)

This is the same standard applied by Kentucky Courts in *Commonwealth, Department of Highways* v. *Burchatt,* Ky., 367 S. W. 2d 262 (1963), and *Commonwealth, Department of Highways* v. *Vandertoll,* Ky., 388 S. W. 2d 358 (1964).

The record in this case clearly reflects a detailed, careful planning process intended to revitalize the entire blighted area with as little private injury as possible given the overall goal. The various allegations concerning the taking made by Petitioner were not supported by the facts. That is where his case fails. Given the opportunity he was unable to susbtantiate any of his claims of abuse of discretion and, therefore, the law as set out in *Berman* v. *Parker,* 348 U. S. 26 (1984) (at p. 35-36) does apply in this case.

CONCLUSION

For the reasons stated herein and based upon the authorities cited, the Respondent, City of Louisville, by and through the Urban Renewal and Community Development Agency of Louisville respectfully asserts that Petitioner has not demonstrated the "special and

important reasons" for granting a writ of certiorari pursuant to Rule 17 of the Rules of the Supreme Court of the United States. Therefore Respondent respectfully requests that this Petition be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari has been served upon all counsel of record by depositing the same in the United States Mail, first class postage prepaid, to the following persons on the 20th day of October. 1987.

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